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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Application Number: 09/964,232
Filing Date: September 26, 2001
Appellant(s): GRIB ET AL.

Daniel P. Dooley
<u>For Appellant</u>

EXAMINER'S ANSWER

This is in response to the appeal brief filed 7-20-2009 appealing from the Office action

mailed 10-28-08.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,627,766	**Beaven et al.**	5-1997
6,763,380	**Mayton**	7-2004
6,360,268	**Silva**	3-2002
20030036865	**Zhuo**	2-2003

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

These rejections are set forth in prior Office Action, Paper No. 09964232\20081017 and reproduced for convenience.

Claim Rejections - 35 USC § 101

1.   35 U.S.C. 101 reads as follows:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

2.   Claim 15 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

The computer program may be intended by the applicant to embrace only a program embodied on a tangible medium, it may be meant to embrace only the code itself, or it may be meant to embrace the code embodied in an intangible medium. A

computer program is to be construed as a computer program per se, unless the

application makes clear that the only reasonable interpretation of the word, " computer

program ", is a product that includes code set forth on a tangible computer-readable

medium.   Examiner looked to the specification to determine whether the only

reasonable interpretation of the claim is that the " computer program " is directly

loadable into a memory of a digital computer includes the required tangible medium

(e.g., a floppy disc) or whether the broadest reasonable interpretation of the claim would

be that it includes only the program per se (code alone) or the program on an intangible

medium (such as a signal or carrier wave).

Claim 15 indicates that "computer-readable medium containing a computer-

executable instructions for performing a method by steps comprising: " is not limited to

tangible embodiments.   In view of Applicant's disclosure, specification para 1, page 8,

the medium is not limited to tangible embodiments, instead it is not clearly defined

tangible embodiments (e.g., RAMs, EPROMs, EEPROMs,) and intangible embodiments

(e.g. signaling mechanisms and signals) are indicated.

> Spec. para1, page8:
>
> As used herein and contemplated by the invention, computer-readable medium is
> not limited to memory and storage devices; rather computer-readable medium is an extensible
> term including other storage and **signaling mechanisms** including interfaces and devices such
> as network interface cards and buffers therein, as well as any communications devices and
> **signals received and transmitted**, and other current and evolving technologies that a
> computerized system can interpret, receive, and/or transmit.

As such, the claim is not limited to statutory subject matter and is therefore **non-

statutory**. Appropriate correction is required.

Claim Rejections - 35 USC § 102

3.   The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that

form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless -
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4.   **Claims 1 - 4, 15 - 17** are rejected under 35 U.S.C. 102(e) as being anticipated by

Beaven et al. (US Patent No. **5,627,766**).

Regarding Claim 1, Beaven discloses a method performed by one or more

components in a network comprising a plurality of paths between a first device and a

second device, the method comprising:

   a) conducting a first performance test of a first type (Beaven col 2, ll 44-48:

       communication types (i.e. a first type)) over a first path of multiple paths between

       first and second devices; col 3, ll 19-24; col 3, ll 58-67: measurement test of

       network performance (first test) for a path selected from multiple paths between

       two network connected devices (first, second devices))

   b) conducting a second performance test of the first type (Beaven col 4, ll 8-13:

       communication type (a first type) over an alternative path (second path) of the

       multiple paths between first and second devices); and

c)   wherein a processor initiates the simultaneous execution of the first and the

second non-sequential performance tests are performed simultaneously.

(Beaven col 4, ll 8-13: concurrent, simultaneous execution of performance tests

of alternate paths between nodes (first, second devices))

Regarding Claim 2, Beaven discloses the method of claim 1, wherein the first

performance test produces a first set of results;

a)   wherein the second performance test produces a second set of results; (Beaven

col 3, ll 19-24; col 4, ll 3-5: results are generated for performance tests (second

set)) and

b)   further comprising presenting a service level performance comparison based on

the first and second sets of results. (Beaven col 3, ll 19-24; col 3, ll 58-67:

performance factors (service level) determined from test results, such as poor

performance from latency or communication outages)

Regarding Claim 3, Beaven discloses the method of claim 2, wherein the first

performance test includes a plurality of first individual performance tests performed over

an extended time duration; and the second performance test includes a plurality of

second individual performance tests performed over the extended time duration.

(Beaven col 4, ll 8-13: tests performed over multiple paths of network topology; col 8,

line 66 - col 9, line 5: repeated tests over multiple paths between two network

connected devices over an extended time period (time based tests))

Regarding Claim 4, Beaven discloses the method of claim 3, wherein each of the pluralities of first and second individual performance tests are performed at roughly periodic intervals over the extended time duration. (Beaven col 8, line 66 - col 9, line 5: time based tests (periodic intervals) performed)

Regarding Claim 15, Mayton discloses a computer readable medium containing computer executable instructions for performing a method by steps comprising: (Mayton col 5, ll 6-18: performance test system can be implemented as computer program product)

    a) conducting a first performance test of a first type over a first path of a plurality of paths between a first and second devices; (Beaven col 2, ll 44-48: communication types (i.e. a first type)) over a first path of multiple paths between first and second devices; col 3, ll 19-24; col 3, ll 58-67: test for measurement of network performance (a first test) for a route (path) selected from multiple routes (paths) between two network devices (first and second device); col 4, ll 62-67: software, program product)

    b) conducting a second performance test of the first type over a second path of the plurality of paths between the first and second devices; (Beaven col 4, ll 8-13: communication types (a first type) over an alternative path (second path) of the multiple paths between first and second devices); and

    c) wherein a processor initiates the simultaneous execution of the first and the

second non-sequential performance tests are performed simultaneously.

(Beaven col 4, ll 8-13: concurrent, simultaneous execution of performance tests

of alternate paths between nodes (first, second devices))

Regarding Claims 16, Mayton discloses a network comprising:

    a) a plurality of paths between a first device and a second device; (Beaven col 4, ll

       8-13: multiple (alternate) paths between two network connected nodes)

    b) means for conducting a first performance test of a first type (Beaven col 2, ll 44-

       48: communication types (i.e. a first type)) over a first path of multiple paths

       between first and second devices; col 3, ll 19-24; col 3, ll 58-67: test for

       measurement of network performance (a first test) for a route (path) selected

       from multiple routes (paths) between two network devices (first and second

       device))

    c) means for conducting a second performance test of the first type (Beaven col 4, ll

       8-13: communication types (a first type) over an alternative path (second path) of

       the multiple paths between first and second devices)

    d) wherein a processor initiates the simultaneous execution of the first and the

       second non-sequential performance tests are performed simultaneously.

       (Beaven col 4, ll 8-13: concurrent, simultaneous execution of performance tests

       of alternate paths between nodes (first, second devices))

Regarding Claim 17, Beaven discloses the network of claim 16,

a) wherein said means for conducting the first performance test includes means for

generating a first set of results; wherein said means for conducting the second

performance test includes means for generating a second set of results; (Beaven

col 4, ll 3-5: results are generated for performance tests (first, second set)) and

b) further comprising means for presenting a service level performance comparison

based on the first and second sets of results. (Beaven col 3, ll 19-24; col 3, ll 58-

67: performance factors (service level) determined from test results, such as poor

performance from latency or communication outages)

Claim Rejection - 35 USC § 103

5.   The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

> a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in
> section 102 of this title, if the differences between the subject matter sought to be patented and the prior art
> are such that the subject matter as a whole would have been obvious at the time the invention was made
> to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be
> negatived by the manner in which the invention was made.

6.   Claims **5 - 9, 13, 18 - 29** are rejected under 35 U.S.C. 103(a) as being

unpatentable over **Beaven** in view of **Mayton** (US Patent No. **6,763,380**).

Regarding Claims 5, 18, Beaven discloses the method of claims 1, 16.   Beaven does

not explicitly disclose a first transport network and a second transport network.

However, Mayton discloses wherein the first path transverses a first access network, a

first transport network, and a second access network; and the second path transverses

the first access network, a second transport network, and the second access network.

(Mayton col 8, ll 57-63: multiple transport protocols (TCP and RTP) utilized in

generating performance test data)

It would have been obvious to one of ordinary skill in the art to modify Beaven to

utilize transport layer networks as taught by Mayton.   One of ordinary skill in the art

would have been motivated to employ the teachings of Mayton in order to enable the

capability to analyze the actual performance of the network and receive the benefit of

network performance tools that reduce the level of expertise about network topology

required of IT personnel.   (Mayton col 3, ll 8-13: " ... *It is increasingly important to*

analyze the actual performance of the network to be tested without the constraints and

limitations of these existing tools. It would also be beneficial to provide network

performance tools that reduce the level of expertise about network topology required of

IT personnel.   ... ")

Regarding Claims 6, 19, 24, 27, Beaven discloses the method of claims 1, 16, 23.

Beaven does not explicitly disclose receiving a scheduling request. However, Mayton

discloses wherein further comprising receiving a scheduling request representing the

first and second performance tests. (Mayton col 3, ll 16-22: perform tests based on a

schedule)

It would have been obvious to one of ordinary skill in the art to modify Beaven to

enable the capability for receiving a scheduling request as taught by Mayton.   One of

ordinary skill in the art would have been motivated to employ the teachings of Mayton in

order to enable the capability to analyze the actual performance of the network and receive the benefit of network performance tools that reduce the level of expertise about network topology required of IT personnel.   (Mayton col 3, ll 8-13)

Regarding Claim 7, Beaven discloses the method of claim 6. Beaven does not explicitly disclose that the scheduling request is received by a scheduling system. However, Mayton discloses wherein the scheduling request is received by a scheduling system; and the scheduling system communicates a first indication of the request to the first device. (Mayton col 11, ll 34-40: test scheduler communicates schedule information to endpoint nodes (first and second network devices))

It would have been obvious to one of ordinary skill in the art to modify Beaven for the scheduling request to be received by a scheduling system as taught by Mayton. One of ordinary skill in the art would have been motivated to employ the teachings of Mayton in order to enable the capability to analyze the actual performance of the network and receive the benefit of network performance tools that reduce the level of expertise about network topology required of IT personnel.   (Mayton col 3, ll 8-13)

Regarding Claim 8, Beaven discloses the method of claim 7. Beaven does not explicitly disclose that the scheduling system further communicated a second indication of the request to the second device. However, Mayton discloses wherein the scheduling system further communicated a second indication of the request to the second device. (Mayton col 11, ll 34-40: test scheduler communicates schedule

information to endpoint nodes (first and second network devices))

It would have been obvious to one of ordinary skill in the art to modify Beaven for a scheduling request to be received by a scheduling system as taught by Mayton.   One of ordinary skill in the art would have been motivated to employ the teachings of Mayton in order to enable the capability to analyze the actual performance of the network and receive the benefit of network performance tools that reduce the level of expertise about network topology required of IT personnel.   (Mayton col 3, ll 8-13)

Regarding Claims 9, 20, Beaven discloses the method of claims 6, 19. Beaven does not explicitly disclose scheduling the first and second performance tests based on the scheduling request and a random time component. However, Mayton disclose wherein further comprising scheduling the first and second performance tests based on the scheduling request and a random time component. (Mayton col 14, ll 49-52; col 8, ll 52-57: tests are performed at random based on exception events)

It would have been obvious to one of ordinary skill in the art to modify Beaven for a scheduling request received by a scheduling system as taught by Mayton.   One of ordinary skill in the art would have been motivated to employ the teachings of Mayton in order to enable the capability to analyze the actual performance of the network and receive the benefit of network performance tools that reduce the level of expertise about network topology required of IT personnel.   (Mayton col 3, ll 8-13)

Regarding Claim 13, Beaven discloses the method of claim 6. Beaven does not

explicitly disclose whether a number of scheduled tests exceeds a first threshold

number for the first device or exceeds a second threshold number for the second

device. However, Mayton discloses wherein further comprising determining whether a

number of scheduled tests exceeds a first threshold number for the first device or

exceeds a second threshold number for the second device. (Mayton col 6, line 66 - col

7, line 3: threshold values are utilized)

It would have been obvious to one of ordinary skill in the art to modify Beaven for a

scheduling request received by a scheduling system as taught by Mayton. One of

ordinary skill in the art would have been motivated to employ the teachings of Mayton in

order to enable the capability to analyze the actual performance of the network and

receive the benefit of network performance tools that reduce the level of expertise about

network topology required of IT personnel. (Mayton col 3, ll 8-13)

Regarding Claim 21, Beaven discloses a network comprising:

wherein a processor initiates the simultaneous execution of a performance test is

between the first device and the second device over each of the first and second

transport networks simultaneously. (Beaven col 4, ll 8-13: concurrent, simultaneous

execution of performance tests of alternate paths between nodes (first, second

devices)) Beaven does not explicitly disclose transport networks.

However, Mayton discloses:

a) a first device coupled to a first access network; the first access network coupled

to a first and a second transport networks; (Mayton col 9, ll 38-41; col 8, ll 62-63:

one or more transport protocols (i.e. TCP, UDP, RTP) utilized for network

communications)

    b) a second access network coupled to the first and the second transport networks;

    (Mayton col 9, ll 38-41; col 8, ll 62-63: one or more transport protocols (i.e. TCP,

    UDP, RTP) utilized for network communications) and

c) a second device coupled to the second access network;

It would have been obvious to one of ordinary skill in the art to modify Beaven for

communications utilizing transport networks as taught by Mayton.   One of ordinary skill

in the art would have been motivated to employ the teachings of Mayton in order to

enable the capability to analyze the actual performance of the network and receive the

benefit of network performance tools that reduce the level of expertise about network

topology required of IT personnel.   (Mayton col 3, ll 8-13)

Regarding Claim 22, Beaven discloses the network of claim 21.   Beaven does not

explicitly disclose utilizing transport networks.   However, Mayton discloses wherein the

first device is coupled to a first router, wherein the first router selectively routes

performance testing packets received from the first device over a first path to the first

transport network and a second path to the second transport network. (Mayton col 8, ll

57-63: communications implemented utilizing multiple transport protocols (TCP and

RTP))

It would have been obvious to one of ordinary skill in the art to modify Beaven for

communications utilizing transport networks as taught by Mayton.   One of ordinary skill

in the art would have been motivated to employ the teachings of Mayton in order to enable the capability to analyze the actual performance of the network and receive the benefit of network performance tools that reduce the level of expertise about network topology required of IT personnel. (Mayton col 3, ll 8-13)

Regarding Claim 23, Beaven discloses the network of claim 21. Beaven does not explicitly disclose a performance test scheduler. However, Mayton discloses wherein further comprising a performance test scheduler. (Mayton col 11, ll 34-40: test scheduler coordinates performance testing)

It would have been obvious to one of ordinary skill in the art to modify Beaven for a performance test scheduler as taught by Mayton. One of ordinary skill in the art would have been motivated to employ the teachings of Mayton in order to enable the capability to analyze the actual performance of the network and receive the benefit of network performance tools that reduce the level of expertise about network topology required of IT personnel. (Mayton col 3, ll 8-13)

Regarding Claim 25, Beaven discloses the network of claim 24, further comprising a results collector for receiving a set of results associated with the performance test. (Beaven col 3, ll 58-67: performance data collected)

Regarding Claim 26, Beaven discloses the network of claim 25. Beaven does not explicitly disclose transmitting at least a subset of the set of results to the client device.

However, Mayton discloses wherein the results collector transmits at least a subset of the set of results to the client device. (Mayton col 8, ll 32-35: endpoint nodes (client: network devices) analyze performance data)

It would have been obvious to one of ordinary skill in the art to modify Beaven for transmitting at least a subset of the set of results to the client device as taught by Mayton.   One of ordinary skill in the art would have been motivated to employ the teachings of Mayton in order to enable the capability to analyze the actual performance of the network and receive the benefit of network performance tools that reduce the level of expertise about network topology required of IT personnel.   (Mayton col 3, ll 8-13)

Regarding Claim 28, Beaven discloses the network of claim 27. Beaven does not explicitly disclose communicating a second scheduling instruction associated with the performance test to the second device. However, Mayton discloses wherein the performance test scheduler communicates a second scheduling instruction associated with the performance test to the second device. (Mayton col 3, ll 16-22: scheduling information transmitted to endpoint nodes (first and second network devices)

It would have been obvious to one of ordinary skill in the art to modify Beaven for communicating a second scheduling instruction associated with the performance test to the second device as taught by Mayton.   One of ordinary skill in the art would have been motivated to employ the teachings of Mayton in order to enable the capability to analyze the actual performance of the network and receive the benefit of network

performance tools that reduce the level of expertise about network topology required of

IT personnel.   (Mayton col 3, ll 8-13)

Regarding Claim 29, Beaven discloses the network of claim 28.   Beaven does not

explicitly disclose entering the test mode in response to receiving the second scheduling

instruction. However, Mayton discloses wherein the second device includes a test

mode; and wherein the second device enters the test mode in response to receiving the

second scheduling instruction. (Mayton col 3, ll 16-22: second network devices used in

generation of performance data)

It would have been obvious to one of ordinary skill in the art to modify Beaven to

enable the capability for the scheduling request is received by a scheduling system as

taught by Mayton.   One of ordinary skill in the art would have been motivated to employ

the teachings of Mayton in order to enable the capability to analyze the actual

performance of the network and receive the benefit of network performance tools that

reduce the level of expertise about network topology required of IT personnel.   (Mayton

col 3, ll 8-13)

7.   Claims **10, 11, 14** are rejected under 35 U.S.C. 103(a) as being unpatentable

over **Beaven-Mayton** and further in view of **Silva** (US Patent No. **6,360,268**).

Regarding Claim 10, Beaven-Mayton discloses the method of claim 6, further

comprising a performance test scheduler between a first and second network device.

(Mayton col 3, line 66 - col 4, line 9) Mayton does not explicitly disclose determining whether the scheduling request is authorized. However, Silva discloses determining whether the scheduling request is authorized. (Silva col 7, ll 10-14: determine if user has permission to perform test)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Beaven-Mayton to determine whether a scheduling request was authorized as taught by Silva. One of ordinary skill in the art would be motivated to employ Silva in order to maximize efficiency for test scheduling in the generation of network communication performance metrics. (Silva col 1, ll 44-48: " … maximize efficiency in the handling of test scheduling and test execution … automate … testing by using a server to manage test machines and to allocate test packages … in accordance with a schedule … ")

Regarding Claim 11, Beaven-Mayton discloses the method of claim 10, further comprising a performance test scheduler between a first and second network device. Mayton does not explicitly disclose determining whether the scheduling request is not authorized. However, Silva discloses indicating that the scheduling request is not authorized. (Silva col 7, ll 10-14; col 12, ll 38-47: determine if user has permission to perform test)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Beaven-Mayton to indicate whether a scheduling request was not authorized as taught by Silva. One of ordinary skill in the art would be

motivated to employ Silva in order to maximize efficiency for test scheduling in the generation of network communication performance metrics. (Silva col 1, ll 44-48)

Regarding Claim 14, Beaven-Mayton discloses a performance test scheduler between a first and second network device. Mayton does not disclose the capability to indicate a failed scheduling request. However, Silva discloses the method of claim 13, further comprising indicating a failed scheduling request. (Silva col 7, ll 10-14; col 12, ll 38-47: determine if user has permission to perform test)

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Beaven-Mayton to indicate a failed scheduling request as taught by Silva. One of ordinary skill in the art would be motivated to employ Silva in order to maximize efficiency for test scheduling in the generation of network communication performance metrics. (Silva col 1, ll 44-48)

8.   Claim **12** is rejected under 35 U.S.C. 103(a) as being unpatentable over **Beaven-Mayton** and further in view of **Zhuo** (US Patent No. **20030036865**).

Regarding Claim 12, Beaven-Mayton discloses the method of claim 6. Beaven-Mayton does not explicitly disclose whereby determining whether the scheduling request conflicts with a second scheduling request. However, Zhuo discloses further comprising determining whether the scheduling request conflicts with a second scheduling request. (Zhuo para 063, ll 14-27: test parameters for scheduling request in

conflict)

It would have been obvious to one of ordinary skill in the art at the time the

invention was made to modify Beaven-Mayton to determine test scheduling conflicts as

taught by Zhuo. One of ordinary skill in the art would be motivated to employ Zhuo in

order to optimize the efficient coordination for test scheduling in the generation of

network communications performance metrics. (Zhuo para 007, ll 9-11: *" ... methods

and systems for timely and efficient coordination and conduct of remote equipment tests

would be desirable ... "*)

(10) Response to Argument

Argument 1: Applicant argues *the 101 rejection. (Appeal Brief Page 8-11)*

Response to Argument 1:

The *specification* discloses on page 8, paragraph 1 that computer readable

medium includes storage and **signaling mechanisms**. In the broadest sense and to

one well known in the art, signaling indicates *carrier-wave type communications* and an

intangible embodiment. The computer readable medium is not clearly defined as a

tangible embodiment. Carrier-wave type communications associated with a computer

readable medium used for program code is directed towards non-statutory subject

matter and therefore is non-statutory and rejected using a 101 rejection.

Argument 2.1: Applicant argues that the referenced prior art does not disclose, *that a*

processor initiates the simultaneous execution".   (Appeal Remarks Page 12)

Response to Argument 2.1:

Beaven discloses the initiation and **execution of simultaneous test**. (Beaven col

4, ll 8-13: multiple tests initiated (execution started) at different nodes; multiple tests

running simultaneously)   Beaven discloses monitoring of multiple connections between

two nodes and automatically detecting all alternate paths. The claimed invention

discloses a first test over a first path and a second test over a second path.   Beaven

discloses detecting all alternate paths between two nodes and initiating tests using the

multiple connections between two nodes.   Based on this disclosure, Beaven discloses

a first test over a first path and a second test over a second path.

Beaven discloses a computer which implies to one skilled in the art **a processor** or

a CPU. (Beaven col 16, ll 66-67: a computer for monitoring the performance of links)

In Beaven a computer initiates the performance tests. **Mayton explicitly** discloses a

processor for the execution of program instructions. (Mayton col 12, ll 38-42:

instructions which execute on a processor, and implement specified functions)

Argument 2.2: Applicant argues that the referenced prior art does not disclose,

"presenting a service level performance comparison". (Appeal Brief Page 16)

Response to Argument 2.2:

Beaven discloses an analysis of the time taken to traverse each communications

link. The performance of each link is calculated using of starting and ending times for

data transversal over a communications link. (**Beaven col 3, ll 61-67**: analysis process

time taken to traverse each link, the performance of that particular link) Beaven

discloses that the **performance determination results are displayed**. (Beaven col 2,

ll 61-65: compute performance of communication links and possibly display **the results**

(presenting the comparisons))

Argument 3.1: Applicant argues that the Mayton prior art does not disclose *an alleged*

deficiency: "a processor initiates the simultaneous execution of a performance test

between a first device and a second device ... the first and second transport networks

simultaneously"". (Appeal Brief Page 17)

Response to Argument 3.1:

Mayton is not used to disclose a processor to initiate simultaneous performance

tests. Mayton is used to explicitly disclose a transport network. (Mayton col 9, ll 38-41;

col 8, ll 62-63: one or more transport protocols (i.e. TCP, UDP, RTP) utilized for network

communications) **Beaven discloses a processor that initiates simultaneous**

execution of performance tests. (Refer to Response to Argument 2.1)

Argument 3.2: Applicant argues *dependent claims 22 - 29. (Appeal Brief Page 17)*

Response to Argument 3.2:

The successful responses to arguments for independent claim 21, also successfully respond to the current arguments against the dependent claims 22 - 29.

Argument 4.1: Applicant argues that the Silva prior art does not disclose *an alleged deficiency: "a processor initiates the simultaneous execution of a performance test between a first device and a second device ...". (Appeal Brief Page 18)*

Response to Argument 4.1:

Silva is not used to disclose a processor to initiate simultaneous performance tests.   Silva is used to explicitly disclose determining whether the scheduling request is authorized. (Silva col 7, ll 10-14: determine if user has permission to perform test) Beaven discloses a processor that initiates simultaneous execution of performance tests. (Refer to Response to Argument 2.1)

Argument 4.2: Applicant argues *dependent claims 10, 11, 14. (Appeal Brief Page 17)*

Response to Argument 4.2:

The successful responses to arguments for independent claim 1, also successfully respond to the current arguments against the dependent claims 10, 11, 14.

Argument 5.1: Applicant argues that the Zhou prior art does not disclose *an alleged deficiency: "a processor initiates the simultaneous execution of a performance test between a first device and a second device ...". (Appeal Brief Page 18)*

Response to Argument 5.1:

Zhou is not used to disclose a processor to initiate simultaneous performance

tests. Zhou is used to explicitly disclose determining whether the scheduling request

conflicts with a second scheduling request. (Zhuo para 063, ll 14-27: test parameters for

scheduling request in conflict)   Beaven discloses a processor that initiates

simultaneous execution of performance tests. (Refer to Response to Argument 2.1)

Argument 5.2: Applicant argues *dependent claim 12. (Appeal Brief Page 18)*

Response to Argument 5.2:

The successful responses to arguments for independent claim 1, also successfully

respond to the current arguments against the dependent claim 12.

Conclusion

Beaven discloses the initiation of performance between all computer nodes of a

network. Beaven also discloses performance tests between multiple connections

between two nodes using all alternate paths. This disclosure indicates two performance

tests between two nodes using a first path and a second path. Beaven discloses the

display or presentation of the performance results.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the

Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/K. H. S./

Examiner, Art Unit 2443

Conferees:

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